IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

MARY ANDREWS, EARVIN KYLES, DYLAN BERTUCCI, and JOHN HAMRIC, On Behalf of Themselves and All Others Similarly Situated,	)	**CLASS AND COLLECTIVE ACTION**
Plaintiffs,	)	**CASE NO. 1:14-cv-00135**
v.	)	**JUDGE HAYNES**
TRG Customer Solutions, Inc. *d/b/a* IBEX Global Solutions,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF RENEWED MOTION TO SET A HEARING AND TO ORDER DEFENDANT TO SHOW CAUSE WHY IT SHOULD NOT BE SANCTIONED FOR VIOLATION OF A COURT ORDER

On February 10, 2015, the Parties agreed to adjudicate Plaintiffs' collective claims through an alternative dispute resolution process in order to resolve their dispute as to whether Defendant's mandatory arbitration agreements were enforceable. (*See* Agreement to Arbitrate Claims and Conditionally Certify Collective Action) ("Agreement") (Doc. No. 144-1); (entered as a Court Order in Doc. No. 146). That agreed process, which was adopted as an Order of this Court and which superseded all prior arbitration agreements, involved the conditional certification of a collective action under the Fair Labor Standards Act ("FLSA"); followed by collective mediation; followed, if necessary, by collective arbitration. (*See id.*)

Since that time, Defendant TRG Customer Solutions, Inc. *d/b/a* Ibex Global Solutions ("Defendant" or "IBEX") has repeatedly failed to honor its obligations or meet its deadlines under the Court's Order and has needlessly delayed the resolution of Plaintiffs' claims. Defendant's conduct has already prompted one show cause motion in this case, (Doc. No. 283), which Plaintiffs dropped only after Defendant began—belatedly and partially—to produce the pre-mediation discovery to which Plaintiffs were entitled under the agreement. Even though Defendant did not provide the necessary payroll data to Plaintiffs until months after it was due and has still not responded to Plaintiffs' written discovery requests, Plaintiffs eventually obtained enough data to construct meaningful damage analyses and continue preparing this case for mediation—which was most recently scheduled to have taken place on June 17, 2016. Then, on June 10, 2016, Defendants' counsel sent an email abruptly cancelling this mediation,[1] stating that Defendant would need "additional discovery" before engaging in any meaningful negotiation. Nowhere in this email did Defendant's counsel try to explain why Defendant had failed to take this discovery during the prescribed period—***a period that ended almost a year ago***. Nor did Defendant's counsel explain why they had waited until just a week prior to the long-scheduled mediation to cancel and postpone that mediation indefinitely.

In light of Defendant's pattern of delay and its complete lack of good faith, Plaintiffs request, for a second time, that this Court enter an order, pursuant to Federal Rule of Civil Procedure 16(f)(1)(C) and the Court's inherent power, requiring Defendant to show cause why it should not be subject to sanctions for violating this Court's Order of February 13, 2015. (Doc. No. 146). Plaintiffs also request that this Court set a hearing on this motion to address Defendant's failure to comply with the terms of the Agreement and Order and to determine the proper sanction for Defendant's violations.

[1] The email that Defendant's counsel sent on June 10, 2016 was designated as a "confidential settlement communication" pursuant to Federal Rule of Evidence 408. Plaintiffs do not agree that the email constitutes a settlement communication under that rule. However, to avoid any unnecessary dispute on this issue, Plaintiffs are not attaching that email to this memorandum, and are only quoting it to the extent necessary, though Plaintiffs will be happy to submit it in a supplemental filing if the Court so instructs.

I. **PROCEDURAL BACKGROUND**

Prior to their February 2015 agreement, Plaintiffs and Defendant were hotly contesting two major procedural issues in this case: (1) whether to conditionally certify a collective action under 29 U.S.C. § 216(b); and (2) whether some or all of the named and opt-in plaintiffs had to pursue their claims in arbitration. After much discussion, the Parties agreed that continuing to litigate these issues would substantially delay the resolution of this case, which was not in any party's interest, nor in the interest of the Court. Accordingly, the Parties entered into the Agreement to Arbitrate Claims and Conditionally Certify Collective Action. (Doc. No. 144-1). The Court adopted this Agreement as an Order of the Court, (Doc. No. 146), and this agreement and Order are the subject of the current dispute—as well as the subject of Plaintiffs' initial show cause motion from December of 2015. (Doc. No. 283).

As part of the agreement, the parties expressly agreed that before proceeding to collective arbitration, they would attempt to mediate Plaintiffs' and opt-in Plaintiffs' claims and would engage in limited discovery to help facilitate that mediation. (Doc. No. 144-1 ¶ 12). Specifically, Defendant agreed to

> Produce all available payroll, time and attendance records for each of the Plaintiffs who joins this action during the notice period no later than 60 days following the close of such notice period. This information will be produced in Excel format if possible, or in some other agreeable format.

Id.

The FLSA notice period closed on May 26, 2015.[2] Accordingly, under the terms of the Agreement, Defendant had until July 25, 2015 (*i.e.*, sixty days from the close of the notice period) to produce "all available payroll, time and attendance records" to Plaintiffs in Excel or another agreeable format. Additionally, the agreement specified that "the parties agree that during the notice period **and for a period not to exceed 90 days** they shall engage in discovery in preparation for mediation." (Doc. No. 144-1 ¶ 12) (emphasis added). Based on this language, the deadline for completing all pre-mediation discovery was August 24, 2015.

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[2] Notice was mailed out on March 27, 2015. (Doc. No. 171). Pursuant to the terms of the notice, prospective plaintiffs then had sixty days from that date—*i.e.*, May 26, 2015—to return their opt-in forms. (Doc. No. 144-2).

Plaintiffs served their First Request for Production of Documents on June 26, 2015, consistent with the parties' agreement. Defendant did not respond during the applicable discovery period. Plaintiffs' counsel then followed up various times, asking Defendant to provide the requested information, or, at a minimum, to agree to new hard deadlines by which Defendant would meet its obligations. Defendant still failed to comply and similarly refused to agree to any fixed deadline by which it would produce the requested information.

This intransigence eventually prompted Plaintiffs to file their initial show cause motion on December 10, 2015. (Doc. No. 283). As part of that motion, Plaintiffs specifically noted that "if Defendant is willing to provide the required information and discovery responses between now and the entry of any show cause order, then Plaintiffs will gladly withdraw this motion." (*Id*. at 3). Approximately two months later, on February 8, 2016, Defendant produced a flash drive containing certain responsive documents, and agreed to produce additional responsive documents in the near future. (*See* Supplement to Show Cause Motion) (Doc. No. 293 at 1). Although it was only a partial production of payroll data and did not include any documents or information responsive to Plaintiffs' June 26, 2015 discovery requests, Plaintiffs agreed not to press forward with the show cause hearing and to instead continue working to prepare the case for mediation and, as necessary collective arbitration, as quickly as possible.

The parties agreed to set the mediate for April of 2016, but then pushed the date back to June 16, 2016, based on Defendant's request. However, on June 10, 2016, just a week before that rescheduled mediation was supposed to take place, Defendant's attorneys sent a short email to the mediator and Plaintiffs' counsel, informing them all that "[w]e have come to the decision that Defendant needs to postpone the mediation until additional fact discovery is conducted." That email did not say anything about what discovery Defendant was seeking, why Defendant had failed to seek that discovery prior to the August 24, 2015 pre-mediation discovery deadline, or when Defendant believed that it might be prepared to engage in real mediation in the future.

An express term of the Agreement between the Parties was that both sides would "engage in mediation in ***a good faith effort*** to resolve this dispute prior to submitting the claims to an arbitrator." (Doc. No. 144-1 ¶ 12) (emphasis added). Plaintiffs have honored this agreement and have acted in good faith in moving this case towards mediation. Defendant, in contrast, has not and should now be sanctioned for its pattern of bad faith and intransigence.

II. ARGUMENT

Pursuant to Rule 16(f)(1)(C), a court has authority, on motion or on its own, to issue any just orders if a party or an attorney "fails to obey a scheduling or other pretrial order." Additionally, a district court possesses "inherent authority to manage litigation," and is "'free, within reason to exercise this inherent judicial power in flexible pragmatic ways.'" *John B. v. Goetz*, 879 F. Supp. 2d 787, 861 (M.D. Tenn. 2010) (Haynes, J.) (quoting *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1011 (1st Cir. 1988)). Part of that inherent authority includes the power to impose consequences on intransigent parties and those who act in bad faith. *See First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 512 (6th Cir. 2002) (Haynes, J., sitting by designation) ("[D]istrict courts need the discretion 'to craft sanctions because the power to sanction is essential for them to manage heavy case loads and to protect the interests of litigants.'") (quoting *Graham v. Schomaker*, 215 F.3d 1329, 2000 WL

717093, at *3 (7th Cir. 2000)); *see also id.* at 516 (noting that the exercise of inherent authority "is particularly appropriate for impermissible conduct that adversely impacts the entire litigation").

Defendant's repeated failure to abide by this Court's Order (which incorporated the Defendant's own agreement) has unreasonably delayed and adversely impacted this entire case and should not be allowed to pass without consequence. Defendant should accordingly be required to show cause why it should not be subject to sanctions, under Rule 16(f)(1)(C) and this Court's inherent authority, for its clear and continuous disregard of this Court's order setting deadlines for alternative dispute resolution. (Doc. No. 146) (adopting and incorporating the deadlines in Doc. No. 144-1).

Plaintiffs also ask for the Court to set a hearing—as soon as possible—to address Defendant's failure to comply with the Court's Order and honor its agreement, and to decide the appropriate sanction for Defendant's violations to date.

III. PLAINTIFFS' REQUESTED RELIEF

As noted above, this Court has broad, inherent discretion to craft sanctions that appropriately redress a Defendant's specific misconduct. *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d at 512. In this case, Plaintiffs believe that the following sanctions are appropriate and Plaintiffs' counsel will be prepared to discuss each of these proposed sanctions in greater detailed during the proposed show cause hearing.

First—given that Defendant has demonstrated that it has no intention of mediating in good faith, Plaintiffs ask that they be relieved from any obligation mediate prior to proceeding to collective arbitration pursuant to the terms of the parties' agreement.

Second—given that the parties' agreement contemplates collective arbitration *only* for those opt-in plaintiffs who had actually signed arbitration agreements with Defendant at some point in the past, and given that Defendant has never made a comprehensive production of signed arbitration agreements, Plaintiffs ask that this Court compel Defendant make such a production of signed arbitration agreements within 30 days of the Court's sanction order.

Third—given that Plaintiffs' counsel have incurred meaningful expenses in preparing for mediation—including, without limitation, expenses related to retaining a mediation damages expert, preparing a comprehensive pre-mediation statement for the mediator, and preparing the named plaintiffs for the mediation process—Plaintiffs request that this Court order Defendant to pay those fees and expenses that Plaintiffs and their counsel have incurred in preparing for mediation. Plaintiffs will be prepared to submit a more detailed list of expenses prior to any show cause hearing that this Court sets.

Fourth—given that Defendant has still not fully responded to the discovery requests that Plaintiffs served on June 26, 2015, Plaintiffs ask that this Court compel Defendant to respond to those discovery requests in full within 30 days of the court's sanction order else face additional financial sanctions.

IV. CONCLUSION

As Plaintiffs noted in their original show cause motion, they recognize that these types of motions and the imposition of judicial sanctions are disfavored by this Court. It was only with great reluctance that Plaintiffs' filed their initial show cause motion, and Plaintiffs were quick to abandon their request for sanctions as soon as it appeared that Defendant was taking reasonable steps to comply with its pre-mediation obligations.

Now, however, Defendant has repaid Plaintiffs' patience and forbearance with more bad faith delay. Plaintiffs' patience has reached its end and Plaintiffs respectfully request that this Court hold Defendant accountable for its own bad actions.

Dated: June 14, 2016

Respectfully submitted,

/s/ David W. Garrison

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2016, a true and correct copy of the foregoing *Memorandum in Support of Motion to Set a Hearing and to Order Defendant to Show Cause Why it Should not be Sanctioned for Violation of a Court Order* was served on the following through the Court's ECF System:

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